FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

BRENDA WARNER, Appellant, v. **DR. GILBERT ROSS,** Appellee.	**D.C. CIV. APP. NO. 1999/111** Re: T.C. CIV. NO. 660/1996 Action for Damages

On Appeal from the Territorial Court of the Virgin Islands

Considered: September 28, 2001
Filed: November 23, 2004

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **RHYS S. HODGE**, Judge of the Territorial Court, Division of St. Thomas and St. John, Sitting by Designation.

APPEARANCES: **K. Glenda Cameron, Esq.**
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MEMORANDUM OPINION

Per curiam.

The issue presented for review is whether the Territorial Court erred in granting summary judgment in favor of Dr. Gilbert

Ross ("Dr. Ross" or "appellee"). For the reasons stated below, this Court will affirm summary judgment.

I. FACTS

Brenda Warner ("Warner" or "appellant") visited Dr. Ross on April 23, 1994 complaining of severe pain in her wisdom tooth. Dr. Ross examined Warner and informed her that the tooth was impacted, but it could not be extracted that day because the gum surrounding the tooth was infected and had to be treated before extraction. That being the case, Dr. Ross prescribed an antibiotic to treat the infection and told Warner to return to his office in five days for the extraction. Warner was familiar with the tooth extraction process, because she had previously had three wisdom teeth extracted: two in Lake Tahoe, Nevada and one in Orlando, Florida. (Joint Appendix ("J.A.") at 207.)

Dr. Ross alleged that he advised Warner of several facts during her initial visit: (1) that this would not be "a simple extraction, and that it would involve cutting her gumb [sic] tissue and removing some bone"; (2) that the procedure would "most probably [involve] cutting the tooth"; (3) that "she would be sore for several days afterwards"; (4) that there was a slight "possibility of some nerve damage"; and lastly (5) that nerve damage, if any, might result in "possible numbness." (J.A. at

222.)

Warner returned five days later (April 28, 1994) and Dr. Ross extracted the tooth in a procedure that took approximately two hours. Warner alleges that Dr. Ross had "a lot of problems getting [the tooth] out. Obviously he was extremely frustrated . . . . He was unhappy. He was angry. . . . His assistant asked him to leave the room because he was so agitated." (*Id*. at 92.) Warner also stated that Dr. Ross "apologized several times before [she] left the office." (*Id.* at 215.)

The day after the extraction, Dr. Ross' office called Warner to see how she was feeling. Warner was asleep at the time, but she returned the call Dr. Ross and reported that she still had "aching all through" her jaw. (*Id.* at 213, 229, 240.)On May 5, 1994, Warner returned to Dr. Ross' office to have the suture removed. Dr. Ross testified that on May 5 Warner's condition seemed to be progressing normally. (*Id*. at 230.) Dr. Ross also stated that he treated Warner for a condition called "dry socket," an irritation of the bone lining the socket which "can be very painful," but typically "heals by itself in 1-2 weeks." (*Id.* at 92-93.) Dr. Ross inserted a medicated packing into the extraction site in an attempt to treat Warner's dry socket.

Warner returned to Dr. Ross on May 9, 1994 to have the packing

removed, and alleges that she told him during that visit that she was experiencing numbness in her tongue. (*Id*. at 215.) Warner clearly did not have any concrete recollection of how long Dr. Ross estimated the numbness would last. First, in an interrogatory dated March 1, 1997, she stated that Dr. Ross assured her that it was a temporary condition that would remain "for several days." (*Id*. at 106.) Then, at a deposition on October 26, 1998, Warner testified that Dr. Ross told her the numbness "might continue for weeks." (Id. at 213.) Later in that same deposition, Warner testified that Dr. Ross "may have said six months" but she was "not real sure." (*Id.* at 215.)

Dr. Ross denies that Warner reported any numbness in her tongue to him. He did, however, acknowledge in his deposition testimony that there is a risk of nerve damage during extractions because the procedure involves cutting into soft tissue, and "you cannot know where the nerves are in that soft tissue." (*Id*. at 225.)

Warner continued to experience pain and numbness in her mouth, but she neither called Dr. Ross nor returned to his office because she was "afraid of him." (*Id.* at 93.) When asked during her deposition whether it was at the May 9, 1994 visit to Dr. Ross that she became unhappy with him, Warner explained that she "was unhappy

with him from the day that he took the tooth out. I was unhappy with him because of the frustration, the anger and, obviously, he was not--he was very upset and nervous about what he had done." (*Id.* at 215.) Warner further stated that by the time she returned to Dr. Ross on May 9th, she had drawn the conclusion that he "had done something wrong." (*Id.* at 93, 215.)

Six months later, on December 1, 1994, Warner went to another dentist to have her teeth cleaned. (*Id.* at 72-73.) Warner mentioned the numbness in her tongue to the dental hygienist and was informed that it "was not normal." (*Id*. at 94.)

On November 2, 1995, eleven months after learning that the numbness was not normal, Warner visited Dr. Richard Lusby, a dentist in Nevada. That was the first time, Warner contends, that she became aware that her numbness was caused by severe nerve damage associated with the tooth extraction on April 28, 1994. (*Id.* at 74-76.)Warner brought suit against Dr. Ross on October 30, 1996 alleging that he had been negligent not only in failing to inform her of the risk of nerve damage, but also negligent in performing the extraction.

Dr. Ross filed a motion for summary judgment on November 4, 1998 arguing that Warner's claim was barred by the applicable statute of limitations. Warner filed her opposition to that motion

on January 7, 1999. The trial court granted summary judgment, and this timely appeal followed. The gravamen of Warner's claim is that the two-year limitation period was tolled under the discovery rule and the fraudulent concealment tolling doctrine.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction to review the judgments and orders of the Territorial Court in all civil cases pursuant to V.I. CODE ANN. tit. 4, § 33 (1997 & Supp. 2001); Section 23A of the Revised Organic Act of 1954.[1]

This Court exercises plenary review over the order granting summary judgment, and must "apply the same test that the lower court should have utilized." *Carty v. HOVIC*, 42 V.I. 125, 78 F. Supp. 2d 417 (D.V.I. App. Div. 1999); *Tree of Life Distributing Co. v. National Enterprises of St. Croix, Inc.*, 1998 U.S. Dist. LEXIS 17980, at *6, Civ. No. 1997-30 (D.V.I. App. Div. Nov. 5, 1998).

B. Summary Judgment Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions

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[1] The Revised Organic Act of 1954 is found at 48 U.S.C. § 1613a (1994), *reprinted in* V.I. CODE ANN., Organic Acts, 73-177 (codified as amended) (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["Revised Organic Act"].

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party properly supports its motion for summary judgment, the nonmoving party must establish a genuine issue of material fact in order to preclude a grant of summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The evidence and inferences drawn therefrom must be viewed in the light most favorable to Warner, the nonmovant in this matter. *See id*. at 587; *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366 (3d Cir. 1990).

C. Discovery Rule

Warner first argues the applicable statute of limitations was tolled until such time as she discovered the basis for her malpractice claim.

Title 5 of the Virgin Islands Code ("Code") generally provides that a claim for personal injury must be commenced within two years

of the date that the cause of action accrued. 5 V.I.C. § 31(5)(A). The Code sets forth additional provisions which govern the procedure for filing a medical malpractice action against a health care provider. *See* 27 V.I.C. §§ 166-166l. Section 166d addresses the applicable statute of limitations and provides in relevant part:

> (a) No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect **except that for such a claim against a health care provider for malpractice arising from a foreign object being left in a patient's body the time within which the claim must be filed shall be computed from the time the plaintiff discovers the presence of the foreign object or discovers facts which would reasonably lead to the discovery of the presence of the foreign object**; Provided, That any malpractice claim brought under this subchapter may be filed within two years of the last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the alleged act, omission or neglect . . . .

27 V.I.C. § 166d(a)(emphases added).

"Under the discovery rule, the statute of limitations begins to run when the 'plaintiff knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct.'" *Barnes v. American Tobacco Co.*, 161 F.3d 127, 152 (3d Cir. 1998), *cert. den.* 526 U.S. 1114 (1999) (holding that the discovery rule precluded the

claims of five plaintiffs in an action against cigarette manufacturers because their claims were time-barred); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991) (construing Pennsylvania law and applying the discovery rule in connection with a medical malpractice cause of action); *Joseph v. Hess Oil Virgin Islands Corp.*, 867 F.2d 179, 182 n.8 (D.V.I. 1989) (applying the discovery rule in an asbestosis action and holding that a material question of fact existed as to when plaintiff knew or should have known that his illness was asbestos related); *Phillips v. Taylor*, 18 V.I. 437 (D.V.I. 1981) (applying discovery rule to accrual of medical malpractice claim). As the trial court aptly states:

> [T]he "polestar" of the discovery rule is not the plaintiff's actual knowledge of injury, but rather whether the knowledge was known, or through the exercise of reasonable diligence, knowable to the plaintiff. . . . The question arises whether a plaintiff's discovery of the actual, as opposed to the legal, injury is sufficient to trigger the running of the statutory period. . . . We have in the past stated that a claim accrues . . . upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) (applying the discovery rule to a Title VII employment discrimination matter) (citations omitted). The *Bohus* Court also makes it clear that in order for a claim to accrue, "[t]he plaintiff need not know the exact medical cause of the injury; that the injury is due to another's negligent conduct; or that he [or

she] has a cause of action." 950 F.2d at 924-25 (citations omitted). Warner must, therefore, prove that she exercised reasonable diligence in bringing her claim. *See Barnes*, 161 F.3d at 153.

With these guiding principles, this Court must decide whether the trial court erred in finding that:

> the plaintiff had reason to immediately challenge her health care provider's prognosis. Indeed . . . Warner not only lost confidence in her treating dentist, but she was afraid of him and had concluded that he had done something wrong. Moreover, even if Warner reasonably relied on Dr. Ross' prognosis, the evidence shows that he told her that her pain and numbness could last "up to weeks." In light of this prognosis, it is inexplicable that Warner waited almost seven months before mentioning the problem to a dental hygienist. Although "lay persons should not be charged with greater knowledge of their physical condition than that possessed by the physicians on whose advice they rely[, t]here is indeed some point in time when a patient's own 'common sense' should lead her to conclude that it is no longer reasonable to rely on the assurances of her doctor."

(J.A. at 99-100.)

This Court will affirm the trial judge's ruling on this issue. The record fully supports finding that Warner did not exercise due diligence in bringing her claim. In viewing the evidence in the light most favorable to Warner, the longest period she should have waited before seeking another medical opinion about the numbness of her tongue would have been six weeks from the May 9, 1994 visit to Ross' office to remove the sutures. That is, case law supports

finding that the statute of limitations on Warner's claim began to run on or about June 20, 1994. It is unreasonable for Warner to expect the trial court to simply accept her speculative assertion that Dr. Ross "may have said" that the numbness in her mouth might continue "six months" but she was "not real sure." (*Id.* at 215.) "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48.

Because we decide that the statute of limitations on Warner's action was not tolled beyond June 20, 1994,her complaint was time-barred. Nonetheless, we will briefly consider the application of the fraudulent concealment tolling provision in Section 166d(a), which provides an alternative basis for finding Warner's action untimely.

D. Fraudulent Concealment

Warner also alleges the statute of limitations was tolled because Dr. Ross failed to disclose her injury to her. Section 166d provides that

> a toll of the statute of limitations shall operate for any period during which the health care provider had actual knowledge of any act, omission or neglect or knowledge of facts which would reasonably indicate such act, omission or neglect which is the basis for a malpractice claim and failed to disclose such fact to the patient.

27 V.I.C. § 166d(a). As the trial court found, a jury could reasonably find that Dr. Ross failed to disclose not only the risk of nerve damage, but also the fact that the numbness described to him at the May 9th visit was probably caused by such damage. At the most, it appears that Dr. Ross gave Warner a six-week time frame within which the numbness should cease. Dr. Ross may have concealed the suspected cause of the numbness, but Warner could feel the ongoing discomfort and had ample reasons to suspect that she had sustained an injury during the extraction. By her own admission, Warner was dissatisfied with Dr. Ross' performance and was afraid of him. (J.A. at 93.) She cannot now be said to have reasonably relied upon his professional advise long after she suspected he "had done something wrong." (J.A. at 93.) After approximately June 20, 1994, Warner had a duty to exercise due diligence in ascertaining why the numbness persisted beyond that period. As such, her complaint filed on October 30, 1996 was untimely.

III. CONCLUSION

The evidence presented does not create a genuine issue of material fact, and the trial court's grant of summary judgment in favor of Dr. Ross was, accordingly, appropriate.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk
FOR PUBLICATION

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Attorney for Appellee.

ORDER OF THE COURT

Per curiam.

AND NOW, for the reasons more fully stated in a Memorandum

Opinion of even date, it is hereby

ORDERED that the trial court's grant of summary judgment is **AFFIRMED**.

SO ORDERED this 23rd day of November, 2004.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies (with accompanying Memorandum Opinion) to:

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